

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 September 2007**

**BALCA No.:** 2007-INA-00031  
**ETA Case No.:** D-05220-91228

*In the Matter of:*

**NOSTRA VITA, LLC.**  
**d/b/a**  
**MURPHY'S DELI,**  
*Employer,*

*on behalf of*

**WALID E. ABOUJAWDEH,**  
*Alien.*

**Certifying Officer:** Jenny Elser  
Dallas Backlog Elimination Center

**Appearances:** George J. Prappas, Esquire  
Houston, Texas  
*For the Employer and the Alien*

**Before:** **Chapman, Wood and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title

20, Part 656 of the Code of Federal Regulations (“C.F.R.”).<sup>1</sup> We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

## **BACKGROUND**

The Employer submitted this application for permanent alien labor certification for the position of Specialty Cook, Middle Eastern Food. (AF 76). The CO issued a Notice of Findings (NOF) on February 8, 2007, stating an intent to deny the application. The CO observed that a menu the Employer submitted did not appear to be that of a Middle Eastern food establishment, so there was no need for a specialty cook for Middle Eastern food. Thus, the CO could not determine that a bona fide job existed. The CO also stated that the Employer was not able to clearly show that his business had sufficient income to pay the wage offered to the Alien, as required by 20 C.F.R. §656.20(c). The CO requested that the Employer rebut these findings by submitting the following documents: 1) a copy of the most recent business tax return filed; 2) copies of the last four quarterly unemployment insurance reports filed with the Employer's state; 3) a list of employees including job title and wage; and 4) any documents such as web sites or advertisements that would document the Employer's existence. (AF 59).

The Employer submitted a rebuttal to the CO's NOF on March 13, 2007. The Employer's Vice President argued that he never represented that his establishment was a Middle Eastern Food Establishment. He indicated that the establishment is, instead, part of a franchise, and the menu that the Employer provided is just the franchisor's standard, basic menu. Each separate franchise supplements their menus with additional items that would be popular at their particular location. The Employer stated that the location was in a medical center that employed many Middle Eastern doctors and other personnel, and

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<sup>1</sup> This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

thus there would be interest for a food establishment that served Middle Eastern food. (AF 52). In addition, the Employer provided a list of Middle Eastern fare that is offered at its establishment (AF 53), and a copy of a profit and loss statement. (AF 55-56).

On March 21, 2007, the CO issued a Final Determination denying the application. The CO found that the Employer's rebuttal failed to prove that there was a bona fide job opportunity. The CO found that the Employer did not provide any of the documentation that the CO requested in the NOF. The CO stated that while the Employer provided a list of Middle Eastern dishes that were purportedly served at the Employer's establishment, there was no proof provided that such dishes were actually served, as they were not on the Employer's menu. (AF 50). The CO acknowledged that the Employer had provided an unsigned profit and loss statement, but found no concrete evidence had been submitted to establish that the Employer had sufficient income to pay the wage offered to the Alien.

By a letter dated April 19, 2007, the Employer's representative requested review by BALCA. (AF 1-2). In the letter, the Employer argued that the dishes in question are served buffet-style and thus do not appear in the menu. (AF 5). The Employer provided pictures of the buffet and of the establishment itself to prove their existence. (AF 5; AF 41-45). At the request of the Employer's representative, the Employer prepared a menu-style list of the Middle Eastern dishes it serves. (AF 2; AF 3). The Employer also provided various financial documents, including a tax return, quarterly statements, and a list of employees.

In response to the Employer's request for review, the CO forwarded the matter to this Board on May 30, 2007. The Board issued a Notice of Docketing on June 21, 2007. The Board received a statement of position from the Employer on June 29, 2007 stating that the evidence submitted with the request for review established that a Specialty Cook is needed. The Employer argued that the food is a buffet and not listed on the generic menu provided by the franchisor. The Employer also argued that the financial documentation provided proved its ability to pay the wage offered to the Alien.

## **DISCUSSION**

The regulation at 20 C.F.R. §656.27(c), concerning review on the record by the Board, states that the Board “shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made.” The regulation also states that the Board will take into account “the request for review, and any Statements of Position or legal briefs submitted.” However, 20 C.F.R. §656.26(b)(4) states that the “request for review, statements briefs and other submissions of the parties [...] shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based.” These regulations exclude the possibility of presenting new evidence, such as in a request for review, before the Board which the CO has not reviewed. In his request for review, the Employer submitted new evidence which was not previously on the record. Under the regulations, however, the Board can only examine that evidence on which the CO reviewed and based her denial. See Import S.H.K. Enterprises, Inc., 1988-INA-52 (Feb. 21, 1989)(en banc). Thus, the evidence that the Employer submitted with his request for review cannot be taken into consideration by this Board.

Upon consideration of the evidence before the CO, we find that the Employer failed to show that there was a bona fide job opportunity, and that the Employer did not prove that it had need for a Specialty Cook for Middle Eastern food. In its statement of position, the Employer argued that the “Middle Eastern Food is served buffet-style in a large panoply of dishes. It is not listed on the regular, generic menu provided by the franchisor. Typically, when one goes to dine at a buffet, he is not handed a menu to look at.” However, the Employer provided no proof that such foods are actually served at the establishment. Neither the buffet itself, nor the separate dishes appear on the menu the Employer provided. As the CO stated in her Final Determination, “it seems highly unlikely that a restaurant would offer 24 Middle Eastern specialty foods which do not appear on their menu, particularly if, as stated in their letter, they are trying to offer items which would be popular with their particular customer base.” (AF 50). The buffet that the Employer described also did not appear on the menu provided, and the Employer did

not present any other proof that the buffet existed, such as advertisements for the buffet that the Employer might use to attract its customer base.

In addition, the Employer did not show that it has sufficient income, after all other business expenses, to pay the wage that is offered to the Alien, as required by 20 C.F.R. §656.20(c)(1). The Employer did not submit any evidence verifying the financial state of the business; nor did the Employer provide the documents that the CO had specifically asked for in the NOF. See Gencorp., 1987-INA-659 (Jan. 13, 1989)(en banc) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). Although the Employer did provide a Profit and Loss Statement (AF 55-6), this document was unsigned and uncertified, and did not suffice as credible evidence showing sufficient income to pay the Alien's wages.

In sum, the Employer has not shown that it is offering a bona fide position for a Cook specializing in Middle Eastern food. Nor has the Employer shown that it has sufficient income to pay the wages proffered to the Alien. Accordingly, we find that the CO properly denied certification.

### **ORDER**

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.